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Assessing Australia's National Integrity Framework: A New Way Forward

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CENTER FOR THE ADVANCEMENT OF PUBLIC INTEGRITY

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INTRODUCTION

Historically, Australia has not been regarded as a particularly corrupt country. In 2012, Transparency International ranked Australia as the 7th least corrupt country in its Corruption Perceptions Index. This ranking has deteriorated six places in four years; in 2016, Australia landed in 13th place on the same index.

This sharp decline, in conjunction with continued revelations of corrupt conduct in the public, private and union sectors, has resulted in unprecedented national attention on corruption issues. As a result, the Australian federal government is currently considering a suite of reforms related to anti-corruption enforcement, including the introduction of deferred prosecution agreements, increased penalties for white collar crimes, the introduction of a new corporate foreign bribery offence, and the strengthening of whistle-blower protections.

Included in this suite of proposals, on 8 February 2017, the Australian Senate referred an inquiry regarding the establishment of a national integrity commission to a Select Committee, which was charged with the following goal: to examine whether a National Integrity Commission ("NIC") should be established at the federal level to address institutional, organisational, political, electoral, and individual corruption and misconduct in the federal public sector.[1] The Committee is required to report back on its findings to the Senate on or before 22 September 2017.

THE CURRENT FEDERAL PUBLIC ANTI-CORRUPTION FRAMEWORK

Australia operates as a federal system. There are six Australian states, each of which has a broad-based anti-corruption agency that investigates and prevents corruption in that state's public sector. Generally, these anti-corruption bodies were established either in response to serious or systemic incidents of corruption or police misconduct, to address a public belief that corruption is a problem, or as a pre-emptive measure. The state anti-corruption agencies generally share the following characteristics:

- They enjoy a relatively high public profile;
- They have jurisdiction over the state public sector, but not the private sector;
- They have investigative, preventative and educative functions;[2]
- They possess a range of coercive powers, including the ability to compel the production of documents, issue witness summons, take evidence on oath, apply for and execute search warrants, and hold examinations (including, in some states, in public);
- They issue publicly available reports regarding their activities, such as annual and investigation specific reports. These reports sometimes include structural recommendations for agencies to reduce future corruption risks;
- Each is subject to external oversight.

Essentially, the Senate inquiry deals with calls to establish an anti-corruption agency at the federal level that is similar to these state-level bodies.[3] In contrast to the states, there is no standing anti-corruption body that deals with corruption in the federal public sector. Instead, this responsibility is currently dispersed among several agencies and office holders. This has been described as a "multi-agency approach," whereby different agencies have responsibility for tackling corruption in different areas of government, or in relation to specific integrity issues.

The main agencies currently vested with the responsibility of detecting and investigating corruption across the federal public sector include:

Australian Commission for Law Enforcement Integrity (ACLEI)[4]

The ACLEI is the closest thing to a federal counterpart to the standing anti-corruption agencies at the state level. It differs, however, in its narrow jurisdiction: it is tasked with the detection, investigation and prevention of corruption within Commonwealth law enforcement agencies only.[5] Despite its limited jurisdiction, the Commissioner of the ACLEI has extensive coercive powers, including the power to compel the production of information,[6] the power to conduct hearings in public and in private,[7] the power to issues summonses[8] and take evidence on oath,[9] and the power to apply for search warrants.[10] However, the ACLEI has a low public profile. Being restricted jurisdictionally to corruption issues within law enforcement agencies has resulted in the ACLEI being relatively unknown to the Australian public.

Commonwealth Ombudsman[11]

The Ombudsman considers and may investigate complaints from people who believe they have been treated unfairly or unreasonably by representatives of federal government departments or agencies.[12] This complaint handling and investigative process provides a mechanism by which corruption may be uncovered and investigated in the federal government. The Ombudsman's jurisdiction extends to virtually the entire Commonwealth public service. Notable exceptions, however, include actions taken by a Minister,[13] judicial actions,[14] or actions in relation to employment.[15] Notwithstanding the Ombudsman's wide jurisdiction, the primary focus of the office is on the resolution of complaints brought to it by individuals, rather than the uncovering of corruption generally or systematic examinations of corruption risks.

Australian Public Service Commission (APSC)

The APSC monitors and evaluates compliance with the Australian Public Service (APS) Values and Code of Conduct. Relevantly, the Code of Conduct states that agency heads and APS employees must not use their employment improperly for personal gain. However, a significant proportion of the Australian government administration is not subject to the oversight of the APSC.[16] This includes defence personnel, parliamentary staff, members of the Australian Federal Police and public servants employed under other Commonwealth agency-specific legislation.[17]

Australian Federal Police (AFP)

The AFP investigates federal crimes, including certain bribery offences, money laundering and instances of fraud against Australian government programs (for example, entitlements fraud). As a general law enforcement agency, all individuals in the federal public sector are subject to its jurisdiction. Accordingly, federal government agencies are able to refer allegations of corruption to the AFP for investigation. In 2013, the AFP established the Fraud and Anti-Corruption Centre to "coordinate the operational response to corruption by bringing together officials from a range of different agencies and leveraging their strengths and expertise." The AFP only deals with instances of serious or complex fraud and corruption. Other integrity issues that do not rise to the level of a federal crime are not dealt with by the AFP.

Auditor-General[18]

The Auditor General conducts performance audits into the operation of federal public bodies and public sector activity.[19] However, the Auditor General is not able to investigate complaints, and individuals do not have standing to request audits from the Auditor-General.[20] Additionally, the Auditor-General may only deal with corruption concerns through its broader mandate relating to the auditing of public sector performance and financial management. And while it may detect and report corruption or maladministration, it does not have the ability to study its cause or correct misconduct.[21]

EVALUATION OF THE CURRENT FRAMEWORK

Arguments against reform

Some Australian commentators contend that, even if the multi-agency approach is unwieldy, reform of the current system is an unnecessary exercise because the levels of corruption in the federal public sector are simply too low to warrant the costs of setting up a new agency.[22] The APSC (the federal body responsible for promoting ethical standards of conduct in the APS) has itself suggested that there is no need for a NIC because levels of corruption are lower at the federal level than in state and local governments:

> "[W]e have found that there has not been the systemic corruption that has been the subject of investigations in the state systems...One of those is around the nature of the work of the APS—in particular, that we tend to be focused on national policy issues. A lot of the risks that are inherent within the state jurisdictions are about having a personal relationship that you can develop—transfer of money and particular decisions can be taken within a smaller group of people that you would actually have a relationship with. In health, in direct policing, in teaching and those sorts of things, there is a direct relationship that you can develop over a period of time."[23]

In 2014, the APS employee census showed that only 2.6% of respondents reported that they had witnessed an APS employee engage in behaviour they would characterise as corrupt.[24] This compares with an online survey conducted among Victorian state public service employees in 2012-13 which found that 16% of respondents thought there was some or a lot of corruption in their agency.[25] The APSC has also suggested that, due to the nature of the functions performed by state public services (for example, land or planning approvals or the granting of mining licences), state activities are inherently more susceptible to corruption.[26] As explored below, the assumption that corruption risks are lower at the federal level can be challenged.

Additionally, some argue that the multi-agency approach is better suited to dealing with corruption because it is not a "one size fits all" approach. Corruption manifests itself in different ways across different parts of the public sector. A multi-agency approach, therefore, allows agencies to consider the risk profile within their own operating environment and take measures to mitigate these risks.

Finally, opponents to a national anti-corruption entity criticise the state anti-corruption bodies for overreaching their mandate, and argue that a federal anti-corruption agency would similarly succumb to these flaws.[27] The New South Wales Independent Commission Against Corruption ("NSW ICAC"), in particular, has been challenged in Court in relation to its pursuit of conduct outside the scope of public corruption,[28] and criticised for the reputational damage it has inflicted with its prolific use of public examinations.[29]

Arguments in favour of reform

On the other hand, a multi-agency framework creates a fragmented approach to integrity. Indeed, the description of Australia's anti-corruption framework as a "model" has been criticised by Transparency International Australia ("TIA"), which has noted that:

> "The recent adoption of the term 'model' suggests that current Commonwealth arrangements reflect a degree of pre-existing planning or coherence which, in TIA's assessment, is factually and historically inaccurate. The Commonwealth's present arrangements would be better understood as the result of decades of largely uncoordinated developments in administrative law, criminal law and public sector management, together with political accident."[30]

As identified by TIA, a multi-agency approach is not necessarily a comprehensive or well-coordinated approach. In fact, it potentially creates a shared, but unwarranted, assumption between agencies that there is effective external oversight which can lead to a greater likelihood of the abrogation of responsibility by such agencies.

Furthermore, diffusing anti-corruption and integrity functions across several institutions denies individuals, both private citizens and public sector employees, a prominent and accessible point for reporting corruption concerns. It fails to foster public confidence in and awareness of integrity enhancing activities undertaken by the government.

The multi-agency framework gives rise to gaps in oversight jurisdiction. Notably, of the institutions reviewed above, none have the express mandate to scrutinise members of parliament or government ministers. Indeed, the Ombudsman is statutorily restricted from doing so. Traditionally in Australia, exposure of ministers and parliamentarians to coercive investigatory authority has occurred only through the specific establishment of Royal Commissions or Parliamentary Committees. Yet, due to Australia's system of Parliamentary democracy, the establishment of such committees or Royal Commissions requires the support of the government in place at that time, creating an undesirable situation where the investigation of public corruption among politicians falls to the agreement of the current government.

Reform is necessary

The assumption that there is too little corruption in the federal public sector to warrant reform can and should be challenged. At a conceptual level, there is no reason to believe that people who work in the federal public sector are inherently more honest or trustworthy than those who work at the state level.[31] As pointed out by a former Commonwealth Ombudsman:

> "[Where]ever there is such a large range of Commonwealth programs, and programs where the Commonwealth is directly funding activities, there are incentives around for corruption, and corruption really results from incentive plus opportunity. Those incentives and opportunities are clearly increasing quite considerably."[32]

Additionally, the modernisation of federal governance in Australia has created a system more prone to the risks of corruption in the future. In recent years, there has been an increase in the funding of political campaigns, privatisation of government services, projects involving discretionary powers conferred on ministers and government officials, and movement of ministers and their staff to the lobbying industry.[33] Corruption risks are also likely to intensify with increasing competitive pressures on business and the growing sophistication of modern organised crime.[34]

Indeed, in recent years, large scale corruption involving well known, reputable public institutions has been uncovered at the federal level in Australia. In 2005, it emerged that the Australian Wheat Board paid kickbacks to Saddam Hussein's Iraqi regime through intermediaries in exchange for valuable wheat contracts.[35] Additionally, in 2013, two firms owned by the Reserve Bank of Australia and their senior executives were charged with, and are currently being prosecuted for, bribing foreign officials to win banknote printing contracts in various Asian and African countries.

Actual levels of corruption or potential for corruption, however, are not the only relevant indicators of whether reform is required. Perceptions of corruption are also critical. In explaining Australia's deterioration in the TI rankings, TIA noted that: "Complacency has driven the index down because Australia is *perceived* to have not acted promptly [on corruption issues]". Domestic polls have confirmed that there is a public belief that corruption is increasing. Forty-three per cent of respondents to an ANU poll indicated that they felt corruption was increasing.[36]

Critically, the poll suggests that the federal government is perceived as the most corrupt level of government when compared to state and local government levels.[37]

This crisis in confidence in public institutions is problematic. Perceived corruption threatens the legitimacy of public offices and institutions, which in turn undermines the rule of law. Complacency is arguably Australia's single largest corruption risk. A refusal to reform the current system may lead to further perceptions that the government is indifferent to corruption, and may jeopardise the continued legitimacy of public institutions. A new national anti-corruption strategy would reflect the importance the federal government places on tackling the threat, actual and perceived, of public corruption.

Options for reform

Three main approaches have been identified as possible options for reform:

1) **Establishment of a National Integrity Commission**. This is the option considered in the Senate Inquiry paper. In summary, this option involves the creation of a standing, broad-based anti-corruption agency at the federal level, similar to those that exist at the state level.
2) **Establishment of an Anti-Corruption Council.** This option has been proposed by Adam Graycar, a prominent academic in the anti-corruption space in Australia.[38] Cases brought to the attention of the Anti-Corruption Council would be referred to the most suitable existing agency. The Council would report to a non-partisan parliamentary committee, and would act primarily as a body for referral, discussion and cooperation. It would not have investigative powers in relation to individual cases.
3) **Establishment of a new Australian Serious Fraud & Corruption Office** to investigate serious criminal corruption and wrongdoing, in conjunction with the establishment of a NIC that would be principally concerned with non-criminal corruption and misconduct falling short of criminality. This approach has been favoured by Transparency International.

Of these three options, the NIC appears to be the most appropriately adapted solution to the problems that have been identified with the multi-agency framework. An Anti-Corruption Council that does not investigate claims of corruption is unlikely to generate a sufficiently high public profile to ameliorate public concerns that the government is complacent about corruption issues. On the other end of the spectrum, the establishment of a new Australian Serious Fraud & Corruption Office (in addition to a new integrity commission) would require a significant overhaul of existing laws and law enforcement agencies. This would likely be a costly, time consuming and politically difficult exercise. A NIC, on the other hand, is more likely to gain traction as a high profile anti-corruption body that can raise public awareness of and confidence in federal anti-corruption enforcement efforts. Working as a parallel to its state counterparts, the Commission is likely to be viewed as a familiar institution and therefore may be more accessible to both private citizens and members of the federal public sector.

Institutional design

The exercise of considering key design elements of a new NIC has already begun. In March 2017, Transparency International Australia released a major paper canvassing key issues for the design of a federal anti-corruption commission: "Integrity of Purpose: Designing a Federal Anti-Corruption Commission."

In this paper, the authors sensibly argue that integrity institutions should be designed with an overarching theory in mind – in this case, to achieve "integrity of purpose," or an institutional fidelity to a stated purpose whereby "the institution exhibit[s] respect for the settled authority of institutional counterparts and … align[s] with individual animating principles and the higher order principles of the legal system." Applying this framework, the following suggestions are made regarding key design elements:

(1) **Legislative purpose:** that the constituting legislation of the NIC include a clear legislative purpose statement that establishes the object of the NIC as being to "suppress corruption and foster public confidence in the integrity of the Commonwealth government by empowering an independent commission with authority to investigate Commonwealth government activities, including through consideration of public complaints, with the goal of identifying and reporting instances of serious or systemic corruption."[39]
(2) **Jurisdiction over conduct**: that the NIC's jurisdiction be limited to investigating matters for which a reasonable suspicion exists that the matter involves serious or systemic misconduct.[40]
(3) **Jurisdiction over agencies and individuals:** a broad jurisdiction of oversight over Commonwealth government activities, including the activities of Parliamentarians, subject to carve-outs to preserve the authority of institutions such as the ACLEI and the Commonwealth Ombudsman.[41]
(4) **Power to constitute public hearings:** hearings presumptively remain private, with the exception of granting the Commissioner discretion to convene a public hearing where the investigation concerns serious and systemic corruption, and the subject has provoked a crisis of public confidence in the government.[42]

These suggestions are a useful start in fixing the deficiencies identified in the current national framework and with the state anti-corruption agencies. The proposed design elements set up a unified method of broad oversight, with a specific, substantive focus on serious and systemic corruption without succumbing to risks of jurisdictional overreach. This unified and familiar approach will likely assist in establishing the NIC as an accessible and prominent anti-corruption body, which may in turn reduce the perception of indifference to corruption at the federal government level.

Issues of independence and accountability also need to be considered. Drawing on the experience of the state agencies, the independence of the new Commissioner could be secured through appointment and removal safeguards (for example, requiring a majority vote in both houses of Parliament), and through fixed appointment terms. Independence can also be secured through the setting of a minimum fixed budget for the NIC. This mechanism does not currently appear to be used by the states, but may be a useful way to enshrine independence. Like the state anti-corruption agencies, the NIC should be required to report annually to the federal parliament and immediately upon the use of extraordinary coercive powers, such as public examinations.

WATCH THIS SPACE

The Select Committee will report its findings regarding the establishment of a NIC to the Senate in September of this year. The likelihood and nature of reform in this area may depend much on the recommendations in that report.

However, even if the Select Committee recommends the creation of a NIC, law reform may nevertheless be stymied by the lack of political appetite demonstrated by the major Australian political parties, in particular, the current Coalition (conservative) government in power. In his submission to this very inquiry, the Attorney General has indicated that he disfavours the creation of a NIC.

Nevertheless, given the growing concern about corruption in Australia, it appears that the issue of improving Australia's national integrity framework will not remain dormant for long.

ENDNOTES

[1] Select Committee on Establishment of a National Integrity Commission, *Terms of reference*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Establishment_of_a_National_Integrity_Commission/NIC/Terms_of_Reference (last visited June 15, 2017). This inquiry was first established on February 24, 2016. At the dissolution of both houses of Parliament on May 9, 2016 in advance of the general election on July 2, 2016, the Select Committee on the NIC ceased to exist. On February 8, 2017, the Committee was re-established in the new Parliament.
[2] There is one exception: the Queensland Crime and Corruption Commission appears to only have an investigatory and preventative mandate.
[3] The Australian Greens, for example, have introduced three Bills into Parliament in the last five years calling for the establishment of a NIC.
[4] *Law Enforcement Integrity Commissioner Act 2006* (Commonwealth).
[5] *Id.,* § 3.
[6] *Id.,* Part 9, Division 1.
[7] *Id.,* Part 9, Division 2.
[8] *Id.,* § 83.
[9] *Id.,* § 87.
[10] *Id.,* Part 9, Division 4.
[11] *Ombudsman Act 1976* (Commonwealth).
[12] *Id.,* § 5(1).
[13] *Id.,* § 5(2)(a).
[14] *Id.,* § 5(2)(b), (ba).
[15] *Id.,* § 5(2)(d).
[16] Australian Law Reform Commission, *Regulating Beyond the Australian Public Service* [13.4] (March 11, 2010).
[17] *Id.*
[18] *Auditor-General Act 1997* (Commonwealth).
[19] *Id.,* §§ 17-18.
[20] Gilbert + Tobin Centre of Public Law, *Submission to Select Committee on the establishment of a National Integrity Commission* 10 (20 April 2016), available at http://www.aph.gov.au/DocumentStore.ashx?id=8be49851-e662-47b4-a373-978d277582da&subId=412590 (last visited June 15, 2017).
[21] *Id.*
[22] NIC Interim Report, at 13-14.
[23] Merit Protection Commissioner, *Submission to Joint Committee on the Australian Commission for Law Enforcement Integrity* 22 (August 14, 2009).
[24] Australian Public Service Commission, *State of the Service Report* 2013-2014, 236-237 (2014).
[25] *Id.*
[26] Australian Public Service Commission, *State of the Service Report* 2012-2013 66 (2013).
[27] See, for example, the Institute of Public Affairs, *Submission to Select Committee on the establishment of a National Integrity Committee* 3 (April 2016), available at http://www.aph.gov.au/DocumentStore.ashx?id=99716645-081d-4037-992f-82c7df9cfb28&subId=412814 (last visited June 15, 2017).
[28] See, for example, *ICAC v Cunneen* [2015] HCA 14, where the High Court of Australia held that the ICAC had no power to conduct an inquiry into allegations that Margaret Cunneen, a Deputy Senior Crown Prosecutor of NSW, had counselled her son's girlfriend to pretend to have chest pains in order to prevent police officers from obtaining evidence of her blood alcohol level at the scene of a car accident. The conduct did not concern the exercise of Ms. Cunneen's official functions as a prosecutor. Nevertheless, ICAC sought to investigate the conduct as "corrupt conduct," an act that was later struck down by the High Court.
[29] See, for example, the resignation of NSW Premier Barry O'Farrell: Australian Broadcasting Corporation, NSW Premier Barry O'Farrell to resign over "massive memory fail" at ICAC (April 16, 2014), available at http://www.abc.net.au/news/2014-04-16/nsw-premier-barry-ofarrell-to-resign-over-icac-grange-wine/5393478.
[30] Transparency International Australia, *Submission to the national anti-corruption plan discussion paper* 8 (2012).
[31] Linton Besser, "Former ICAC head wants federal anti-graft body" *The Age* (June 23, 2014).
[32] Joint Select Committee on the Australian Commission for Law Enforcement Integrity, *Report on the Operation of the Law Enforcement Integrity Commissioner Act 2006* 31 (2011).

[33] Accountability Round Table, *Submission to Parliamentary Joint Committee on Australian Law Enforcement Integrity Commission* 4 (21 January 2011).
[34] Australian Crime Commission, *Organised Crime in Australia 2015 Report* 29 (2015).
[35] Commissioner Terence Cole AO, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme* 14 (2006).
[36] ANU College of Arts and Social Sciences, *Perceptions of Corruption and Ethical Conduct* 10 (October 2012), available at http://www.ibac.vic.gov.au/docs/default-source/research-documents/anu-poll-october.pdf?sfvrsn=4%20 (last visited June 15, 2017).
[37] *Id.,* 13.
[38] Adam Graycar, "Do we really need a federal ICAC?", *The Age* (11 September 2014).
[39] *Id.*, 19.
[40] *Id.*, 21.
[41] *Id.,* 24-25.
[42] *Id.*, 31.

About:

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